Local 3, International Brotherhood of Electrical Workers, AFL–CIO *and* U.S. Information Systems, Inc. and Local 1106, Communications Workers of America, AFL–CIO, Party in Interest. Case 2–CD–923

September 30, 1997

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The charge in this Section 10(k) proceeding was filed on October 23, 1996, by the Employer, U.S. Information Systems, Inc. (USIS), alleging that the Respondent, Local 3, International Brotherhood of Electrical Workers, AFL–CIO (Electrical Workers or Local 3), violated Section 8(b)(4)(D) of the National Labor Relations Act (the Act) by engaging in proscribed activity with an object of forcing the general contractor of a project to assign certain work to employees Local 3 represents rather than to employees of the Employer represented by Local 1106, Communications Workers of America, AFL–CIO (Communication Workers or Local 1106). The hearing was held on February 20, 1997, before Hearing Officer Christene Mann.

The National Labor Relations Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

USIS is a New York corporation engaged in the business of the installation of ceiling mounted cable trays in commercial and residential buildings. During the 12 months preceding the hearing, USIS purchased and received at its New York facility goods and materials valued in excess of $50,000 directly from outside the State of New York. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Local 3 and Local 1106 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

In 1996, the National Football League (NFL) contracted with Cushman and Wakefield (Cushman) to oversee the renovation of its new offices at 280 Park Avenue in New York City. Cushman awarded the building trades work to a general contractor, Turner Construction (Turner), which in turn hired DVI as its communications consultant. DVI subcontracted the telephone and data communications work to Sprint, which subsequently entered into a contract with the Employer, USIS, to, among other things, install the ceiling mounted cable trays. This work consists of mounting to the ceiling the supporting hardware and frames to which communication cables are ultimately secured. Turner also hired various subcontractors, including Unity Electric, whose employees are represented by Local 3, to do other work on the project.

USIS began its work on the NFL project on or about October 15, 1996, with four USIS employees represented by Local 1106. They were Superintendent Thomas Carino, and USIS employees Michael Wedlick, Scott Sabella, and Ivan Santos. At the hearing, Carino testified that on that first day, Local 3 Shop Steward Mike O'Neill approached Carino and asked to see his union card. Carino showed O'Neill his Communications Workers card and told O'Neill that he and his crew would be installing the cable trays. According to Carino, O'Neill replied that cable tray installation was Electrical Workers work. Carino suggested that the two unions' respective officials meet to discuss and resolve the matter. Carino and his crew continued the cable tray installation.

Carino further testified that throughout the next several days, numerous employees represented by Local 3 frequently ''carded'' the four USIS employees represented by Local 1106 while they were doing their work. The employees represented by Local 3 asked the Local 1106-represented employees the name of their employer and claimed that the cable tray installation being performed by Local 1106-represented employees was properly the work of employees represented by Local 3. Eventually, the Local 1106-represented employees complained to Turner Superintendent Ron Olsen about the excessive carding.

Employer witness Wedlick testified that a few days later, on October 22, the day before Turner's weekly meeting with NFL representatives, a Local 3-represented employee, Kenny Kuester, approached USIS employee Sabella to ''card'' him. Sabella showed Kuester his Local 1106 card and the two spoke briefly. Shortly thereafter, about 10 to 15 employees represented by Local 3 angrily approached Carino demanding to know who had hit Kuester. Carino denied that anyone had been hit. The Local 3-represented employees continued their threatening confrontation. Carino testified that he appealed to Local 3 Steward Mike O'Neill stating, ''You know we didn't hit Kenny.'' O'Neill replied, ''Well, anybody who did should be fucking killed.'' Turner Superintendent John Kennedy appeared and told both sets of employees to return to work. USIS employees complied, but the Local 3-represented employees immediately walked off the job about 2 hours before the end of their shift. O'Neill made no effort to prevent the walkout.

USIS President Joseph Lagana testified that, on learning of the incident, he called Turner Manager John Kennedy. Kennedy stated that he was aware of

the incident and was concerned that the Electrical Workers-represented employees would not return to work the next day. He asked Lagana if USIS would relinquish the cable tray installation work so that Kennedy could reassign it to the employees represented by Electrical Workers. Lagana refused, explaining that USIS and the employees represented by Communications Workers had always done the cable tray installations, that he had purchased all the necessary materials, and that if he gave up the work he would have to let some of his employees go. The next day, despite Lagana's refusal to relinquish the work, Turner reassigned the cable tray installation to another contractor, Unity Electric, that had a collective-bargaining agreement with Local 3.

O'Neill testified that on October 22, he heard yelling and went to the 14th floor where there was a commotion and a group of people. Shortly after he arrived, 10 to 15 Unity employees walked off the job. O'Neill testified that he did not cause the work stoppage, did not have the authority to cause a work stoppage, and did not leave work after the confrontation. O'Neill testified that he could not recall making a demand for work to any USIS employees, but acknowledged that Local 3 members were upset that Unity did not have the work of installing the cable trays, as they had heard that the work had originally been assigned to Unity.

B. *Work in Dispute*

The disputed work is limited to the installation of all ceiling mounted cable trays in the NFL building at 280 Park Avenue in New York City.

C. *Contentions of the Parties*

USIS and the Communications Workers contend that a jurisdictional dispute exists and that the Board should resolve the dispute by awarding the disputed work to USIS' employees represented by the Communications Workers. They rely on USIS' contract with the NFL specifically covering the disputed work, the Communications Workers collective-bargaining contract with USIS, USIS' preference and past practice, industry practice, relative skills, and economy and efficiency of operations.

Local 3 filed a motion to quash the notice of hearing asserting that no jurisdictional dispute exists, that there was a total failure of proof that Local 3 made any 8(b)(4)(D) threat or demand that it be given the cable tray installation work, and that the brief walkout of some of Unity Electric's Local 3-represented employees was an impromptu reaction to a perceived threat to one of its coworkers and was not attributable to Local 3.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act, it must be satisfied that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated. This requires a finding that there is reasonable cause to believe that a union has used proscribed means to enforce its claim and that there are competing claims to disputed work between rival groups of employees.[1]

As discussed above, USIS witness Carino testified that on the first day that Local 1106-represented employees were on the jobsite to perform the cable tray installation work, Local 3 Steward O'Neill informed Superintendent Carino that the cable tray work belonged to Local 3.[2] Accordingly, we find that there are active competing claims to the disputed work between rival groups of employees.

We also find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. Contrary to Local 3's contention, the evidence is not conclusive that the purpose of the employee walkout was to protest the alleged hitting of Local 3 member Kenny Kuester by an unnamed Local 1106-represented employee. Simply stated, there is no evidence that any Local 1106-represented employee ever hit or threatened to hit Kuester. In fact, at the hearing, Local 3 Shop Steward O'Neill testified that Kuester had never told him that the Local 1106-represented employee hit him or said that he was going to assault him. Rather, O'Neill testified only that after speaking with Kuester it was his ''impression'' that Kuester felt threatened. Inasmuch as no evidence of a threat to Kuester was proffered at the hearing, we find reasonable cause to

[1] In its brief in support of the motion to quash the notice of hearing, Local 3 asserts that counsel for Local 1106 admitted at hearing that ''the dispute is essentially a jurisdictional dispute. There was *no threat* made and the work was properly given to Local 1106 members.'' Counsel for Local 3 then argues, citing *Electrical Workers IBEW Local 3 (Eugene Iovine, Inc.)*, 219 NLRB 528 (1975), that because there was ''no threat made'' by Local 3 to force the reassignment of work, there is no reasonable cause to believe that Local 3 engaged in conduct violative of Sec. 8(b)(4)(D) of the Act. Local 3's argument, however, is disingenuous. A careful reading of the transcript of hearing clearly establishes that when counsel for Local 1106 stated that there was ''no threat made,'' she was referring to the fact that no employee represented by Local 1106 had threatened Local 3 member Kenny Kuester with assault. It was this supposed threat by a Local 1106-represented employee that Local 3 asserts as the cause of the October 22 walkout of employees it represents. As discussed below, we find reasonable cause to believe that Local 3's claim that the walkout was caused by the alleged threat to hit Kuester was a pretext to mask the walkout's real purpose, i.e., to force the reassignment of the cable tray installation work to employees represented by Local 3. Counsel for Local 1106 did not admit that there was no resort to proscribed means by Local 3 to force the reassignment of the cable tray installation work.

[2] Because O'Neill was the Local 3 shop steward, we have reasonable cause to believe that he was acting as an agent of Local 3. See *Electrical Workers IBEW Local 3 (New York Telephone Co.)*, 193 NLRB 758, 762–763 (1971), enfd. 467 F.2d 1158 (2d Cir. 1972).

believe that the employees represented by the Electrical Workers did not walk off the job because Kuester had been assaulted or threatened with assault by a Local 1106-represented employee, but rather that Local 3 orchestrated the walkout in support of its demand for reassignment of the disputed work.[3] In this regard, we rely on the following:

Given the lack of evidence to support the reason offered by Local 3 for the walkout, there is reasonable cause to infer that Local 3 was attempting to conceal the real, albeit unlawful, reason for the walkout, i.e., obtaining the cable tray installation work, particularly where, as here, the surrounding facts tend to reinforce the inference. As discussed above, USIS witnesses testified not only that the Local 3 steward demanded the cable tray work, but also that the Local 3-represented employees repeatedly ''carded'' the Local 1106-represented employees and claimed the disputed work. Employer witness Carino testified that Local 3 Steward O'Neill participated in the events leading up to the walkout, and that when he appealed to O'Neill to end the fracas by saying, ''You know we didn't hit Kenny,'' O'Neill inflamed the situation when he loudly replied, ''Well, anybody who did should be fucking killed.'' Immediately thereafter, the Local 3-represented employees walked off the job, and it is undisputed that O'Neill made no effort to stop them. USIS President Lagana testified that the walkout occurred at an important time for general contractor, Turner—the day before its regularly scheduled meeting with NFL representatives—and that Turner representative, Kennedy, told him that if no electrical workers reported for work on the day of the meeting, Turner would be ''embarrass[ed]'' before the NFL representatives. Finally, we note that shortly after the walkout, Kennedy asked Lagana to relinquish the cable tray installation work and, despite Lagana's refusal to do so, the next day the disputed work was reassigned by Turner to another contractor that had a collective-bargaining agreement with Local 3.

In sum, we find that there are competing claims to the work in dispute and that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. Furthermore, there is no evidence that all parties have an agreed-upon method for voluntary adjustment of the dispute. Accordingly, we find that the dispute is properly before the Board for determination, and we deny Local 3's motion to quash the notice of hearing.

[3] It is well established that Sec. 8(b)(4)(D) of the Act prohibits work stoppages that have as ''*an object thereof*'' the coercion of an employer to reassign disputed work (emphasis added). See *Cement Masons Local 577 (Rocky Mountain Prestress)*, 233 NLRB 923, 924 (1977). Thus, the reassignment of the cable tray installation work to employees represented by Local 3 need only be ''an object'' of the work stoppage in order for the conduct to violate Sec. 8(b)(4)(D) of the Act.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

1. Certification and collective-bargaining agreements

There is no evidence that either labor organization has been certified by the Board. Although USIS is party to a collective-bargaining agreement with Communications Workers, only limited portions of the contract were admitted into evidence, and it was not established that the contract necessarily covered cable tray installation work.

Accordingly, we find these factors are not helpful to a determination.

2. Employer preference

The Employer clearly prefers that the cable tray installation work be performed by employees who are represented by Communications Workers Local 1106.

Accordingly, we find that the factor of employer preference favors assigning the disputed work to employees represented by Communications Workers Local 1106.

3. Employer past practice

For many years, the Employer has been assigning cable tray installation work to employees represented by Communications Workers.

Accordingly, we find that this factor favors awarding the work in dispute to employees represented by Communications Workers.

4. Area and industry practice

Although the record shows generally that employees represented by both labor organizations have performed cable tray installation work, there is an absence of specific evidence as to the practice of other employers in the area and in the industry.

Accordingly, we find the factor of area and industry practice does not favor assigning the disputed work to employees represented by the Communications Workers Local 1106 or to Local 3-represented employees.

5. Relative skills and training

The record reveals that employees represented by Local 1106 are specifically trained in the installation of cable trays. They have been trained, both inhouse and by manufacturers, to observe necessary safety precautions and to properly use the necessary mechanical devices such as drills, anchors, beam clamps, threaded rods, and other tools specifically used to install cable trays in both commercial and residential structures. The fact that Turner reassigned the cable tray installation work to employees represented by Local 3 would indicate that those workers also possess the necessary skills to install cable trays. However, Local 3 has presented no evidence related to the specific skills or training for cable tray installation of employees it represents.

Accordingly, we find that in the absence of evidence presented by Local 3, this factor favors assigning the disputed work to employees represented by the Communications Workers.

6. Economy and efficiency of operations

Lagana testified that it is both more efficient and more economical to have the cable tray installation work performed by employees represented by Local 1106. The cable trays must be installed prior to the laying of any cable and serve to map out the route the cables will eventually take. Lagana explained that the Employer maintains more control of the flow of work and the manpower required to complete it if the same employees who will ultimately install the cable do the cable tray installation work. Assignment of the cable tray installation work to employees represented by Local 3 would likely result in occasional periods of inactivity for employees represented by Local 1106 and, thus, would be inefficient.

Accordingly, we find that this factor favors assigning the disputed work to employees represented by Communications Workers Local 1106.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Local 1106, Communications Workers of America, AFL–CIO are entitled to perform the work in dispute. We reach this conclusion relying on employer preference and practice, skills and training, and economy and efficiency of operations.

In making this determination, we are awarding the work to employees represented by Local 1106, Communications Workers of America, AFL–CIO not to that Union or its members.

Scope of the Award

The Employer asserts, citing several cases, that due to the long history of work disputes between Local 3 and the Communications Workers arising out of Local 3's ''total job'' policy,[4] the Board should issue a broad award to avoid similar disputes in the future. For the Board to issue a broad, areawide award, such as the one requested herein, there must be evidence that the disputed work has been a continuing source of controversy in the relevant geographic area and that similar disputes are likely to recur. There must also be evidence which demonstrates that the charged party has a proclivity to engage in unlawful conduct to obtain work similar to the disputed work. *Electrical Workers IBEW Local 211 (Sammons Communications)*, 287 NLRB 930, 934 (1987). Because the Employer cites no case, and we are aware of none other than the instant case, wherein Local 3 attempted to force the reassignment of cable tray installation work from employees represented by Local 1106, we conclude that, under the circumstances of this case, a broad order is inappropriate. Accordingly, the determination is limited to the controversy that gave rise to this proceeding.[5]

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

[4] E.g., *Electrical Workers IBEW Local 3 (General Dynamics)*, 264 NLRB 705 (1982), enfd. 742 F.2d 1438 (2d Cir. 1983). Local 3's ''total job'' policy provides that all work at any job within the jurisdiction of any IBEW local must be done by that local and not by any other tradesmen. 264 NLRB at 709–710.

[5] See *Electrical Workers IBEW Local 3 (Telecom Equipment)*, 266 NLRB 714, 717 (1983), in which the Board declined to issue a broad award under similar circumstances. The Board stated that ''while Local 3 is no stranger to Board proceedings, it has never before sought an assignment of work of the nature of that disputed herein.'' The Board also relied on the fact that Local 3 had not in the past engaged in unlawful conduct with respect to the employers involved in that case. Thus, we conclude, contrary to our dissenting colleague, that notwithstanding Local 3's past misconduct, the requirements for a broad award have not been satisfied on the record presented here.

Member Higgins would grant the broad order sought by the Employer. The Respondent has a long history of violating Sec. 8(b)(4) of the Act. Indeed, the court of appeals has said that the Respondent is ''an incorrigible secondary boycotter.'' See *NLRB v. Electrical Workers IBEW Local 3 (Telecom Plus)*, 861 F.2d 44 (2d Cir. 1988). The court of appeals decision in this case was issued 5 years after *Electrical Workers IBEW Local 3 (Telecom)*, supra, the case cited by my colleagues. During this period, the Respondent continued to violate the Act. Concededly, those cases involve Subsection (B) of 8(b)(4), rather than Subsection (D). However, as the Board has recognized, the Respondent's unlawful 8(b)(4)(B) conduct was in furtherance of its ''total job'' policy under which it claims work that is also claimed by other unions. The instant case involves such a claim. In light of the record of misconduct in pursuit of its jurisdictional claims, supplemented by the conduct in this case, Member Higgins would grant the broad award requested, i.e., an award encompassing all of Local 3's geographic jurisdiction. Finally, while he recognizes that the Board declined to grant broad 8(b)(1)(A) relief in *Electrical Workers IBEW Local 3 (General Electric)*, 299 NLRB 995 (1990), Member Higgins notes that in that case, unlike here, the conduct was ''unrelated'' to the prior violations.

1. Employees of U.S. Information Systems, Inc. represented by Local 1106, Communications Workers of America, AFL–CIO are entitled to perform the cable tray installation work at the National Football League offices at 280 Park Avenue, New York, New York.

2. Local 3, International Brotherhood of Electrical Workers, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Turner Construction to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Local 3, International Brotherhood of Electrical Workers, AFL–CIO shall notify the Regional Director for Region 2 in writing whether it will refrain from forcing Turner Construction, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.